SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

WALTER A. LAVENDER, Administrator of the Estate of Charles Lee Hunter, Deceased, Petitioner, vs. ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Respondent.	No.....

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

and

SUGGESTIONS IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Walter A. Lavender, Administrator of the estate of Charles Lee Hunter, deceased, and respectfully petitions and moves this Honorable Court to set aside the

order of this Court rendered and entered on October 10, 1949 in the above entitled cause denying this petitioner's Application for a Writ of Certiorari to the Supreme Court of Missouri and to grant petitioner a rehearing and reconsideration of this cause, and for grounds of this petition and motion petitioner states as follows:

(a) Since the filing of the petition herein, intervening circumstances of substantial and controlling effect have occurred, such as the sudden and untimely death of two of the Honorable Justices and the untimely injury incapacitating another of the Justices of this Court and the failure of the newly appointed Justices to take the oath of office in time to consider and pass on petitioner's petition.

(b) A substantial ground available to petitioner which has not previously been presented is that the judgment and decision of the Missouri Supreme Court sought to be reviewed is one in which that Court decided a Federal question of substance not theretofore determined by this Court, to-wit: That a railroad employer under the Federal Employers' Liability Act was not liable for the death of one of its dining car employees shot and killed while working within the scope of employment and in the line of duty under the Act where the shooting was caused by the admitted negligence of the other dining car employees in the negligent handling of a pistol while working in the dining car in the line of their duty and within the scope of their employment.

(c) The granting of the petition herein is vital because the question involved here to be decided finally by this Court materially affects a large class of employees who are injured or killed through the negligence of fellow employees by the discharge of firearms, while working in interstate commerce. This court has never passed upon this question heretofore.

The Supreme Court of Missouri has decided a Federal question of substance available to petitioner although not previously presented to this Court. The problem here is one which clearly calls for an exercise of this Court's jurisdiction under present amended Rule 33.

Respectfully submitted,

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N. MURRY EDWARDS,
302 Title Guaranty Building,
St. Louis 1, Missouri,
Attorney for Petitioner.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

(a) The petition herein was filed in this Court on July 2, 1949. Since the filing of the petition two of the Honorable Justices of this Court have passed away and another Honorable Justice of this Court has suffered an injury incapacitating him for the time being. One of the newly appointed Justices at the time of the ruling upon petitioner's petition had not taken the oath of office. Petitioner did not therefore have the benefit of having his petition passed upon by the full Court. The minority of this Court should not overrule the majority by reason of death or disability and without giving the newly appointed Justices an opportunity to pass upon the questions at issue. The principles laid down in the cases of Urie v. Thompson, 69 S. Ct. 1018; Wilkerson v. McCarthy, 60 S. Ct. 413; Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140; Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740; Anderson v. Atchison T. & S. F. Ry. Co., 68 S. Ct. 854 and Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, should not be overruled or changed by a minority of the Court.

(b) and (c) The question raised by petitioner's petition herein is one which has never been presented to this Court before, that is, shall there be a recovery under the Federal Employers Liability Act to injured employees and dependents of deceased employees of interstate commerce for injuries or death while working in the scope of their employment and in their line of duty by the negligent discharge of firearms of other employees who are also working in the line of duty and within the scope of employment. This case cleary affects the claims of a large class of injured interstate employees and dependents of deceased employees, injured or killed while working in interstate commerce. The State court's ruling that there can be no re-

covery in such a class of cases is an erroneous interpretation of the Federal Employers Liability Act. The Honorable Chief Justice of this Court on September 7, 1949 before the American Bar Association in St. Louis, Missouri, stated:

> "Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country. Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. By that I do not mean that the petition should paraphrase the standards set out in Rule 38 of the Supreme Court Rules, as so many petitions do now. What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court."

Petitioner's case falls within the class of cases above described and this Court, as it did in the late case of Urie v. Thompson, supra, should grant petitioner a rehearing and pass upon the questions raised by the petition filed herein as to this class of claims.

Respectfully submitted,

N. MURRY EDWARDS,
302 Title Guaranty Building,
St. Louis 1, Missouri,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1949

No. 161

HENRY D. GREEN, DOING BUSINESS AS GREEN HARVESTER AND IMPLEMENT CO., PETITIONER,

versus

ALLIS-CHALMERS MANUFACTURING CO.,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

It is respectfully submitted that this Honorable Court should not entertain the petition herein for the following reasons:

1. The Court of Appeals properly held that the order of June 20, 1945, was outside the contemplation and terms of the dealer agreement and furnished no basis for recovery, and it properly, and consistently therewith held that the District Judge erred in charging the jury, at variance with that correct conclusion, that the defendant in the trial

court would be liable to petitioner if he were in anywise prejudiced by its allocations of equipment.

2. The decision of the Court of Appeals does not furnish grounds for review on a writ of *certiorari* within the purport of Rule 38, §5(b), of the Rules of this Honorable Court.

STATEMENT

Respondent's objections to the Statement supplied by Petitioner as "Summary Statement of the Matter Involved" are largely concerned with omissions.

Henry D. Green's representation of Allis Chalmers Manufacturing Co. had its origin in the contract year 1938-1939. His sales of farm machinery for that period were 67 items. In 1940 he sold 172 items of equipment; in 1941, 142; in 1942, 79; in 1943, 35 and in 1944, 60.

When notified by letters of June 6, 1945 and June 18, 1945, that his dealer agreement expiring November 1, 1945, would not be renewed and that he should make his plans for the future accordingly, Green retaliated by sending to respondent an order dated June 20, 1945, for almost one million dollars' worth of farm equipment, aggregating 2,839 items which would have filled 158 1/2 railroad cars. This was at a time when the war with Japan was still in progress, production was controlled, and there was a great scarcity of farm machinery. The small amount then being manufactured was allotted to dealers under a system or pattern which took into account their past sales and was basically proportional. Petitioner was one of 88 dealers in North Carolina, South Carolina and part of Virginia, comprising the territory served by respondent's office known as the Charlotte branch. The total value of all items of the kind included in Green's $927,500.58 order which were avail-

able and distributed to those 88 dealers between June 20, 1945, the date of his order, and November 1 of the same year, when his agreement expired, was $364,034.67. The record is replete with evidence of petitioner's knowledge of the shortage of farm machinery at the time of his order, and of his participation in the system under which it was being distributed.

Subsequent to the date of his order, and until his dealer agreement terminated, petitioner continued to accept allocations which amounted in that period to $6,810.66.

At the conclusion of all the testimony, respondent (defendant below) moved for the direction of a verdict in its favor on the grounds that there was no enforceable contract between the parties requiring the filling of the order of June 20, 1945, that petitioner (plaintiff below) had failed to prove that the dealership agreement encompassed any such order, that petitioner accepted the allocations made to him as a substitute for performance, and lastly, that all the testimony conclusively showed that under the terms of the dealership agreement it was excused from making deliveries up to November 1, 1945, after which it had no further obligation. (R. pp. 87-88.)

This motion was overruled, and following the jury's verdict of $3,587.76, a motion for judgment notwithstanding the verdict was likewise overruled. (R. pp. 109-125.)

It was the failure of the Court below to direct a verdict for respondent upon the grounds made that was the subject of the appeal prosecuted to the Court of Appeals.

SUMMARY OF ARGUMENT

I. The Petition and Supporting Brief Misinterpret the Decision of the Court of Appeals.

II. Jurisdiction Should not be Entertained by This Honorable Court

(1) Because the Court of Appeals examined the evidence, properly applied the law thereto and drew the only reasonable conclusion. Right to trial by jury was not thereby violated.

(2) Because the decision of the Court of Appeals does not furnish grounds for review on a writ of *certiorari.*

ARGUMENT

I

The Petition and Supporting Brief Misinterpret the Decision of the Court of Appeals

It is submitted at the outset that petitioner has a fundamental misconception of the paramount question involved in this action. Petitioner apparently asserts that the paramount question is: did the Court of Appeals erroneously consider and decide a question of fact in arriving at its conclusion; whereas, the primary question presented and decided was whether the order of June 20, 1945, furnished a basis of recovery as a matter of law.

Petitioner makes no attack upon the basis of the decision of the Court of Appeals: that the order was outside the contemplation and terms of the dealership agreement. Rather, he mistakes a part for the whole and assails the correctness of two minor and inconsequential supports of the firm structure of the opinion; and, even in these minor particulars, we submit that he fails to point to error.

Under "Questions Presented" (Petition, p. 8) the Court of Appeals is charged with error in reversing the judgment on the ground "that the order was not given in good faith and was not authorized by the contract", but petitioner says at the same place that the error is "that whether or not the order **was placed in good faith**" was a jury question, and that on that point he has been deprived of a trial by jury. He completely glosses over, and charges no error in the holding that the order **"was not authorized by the contract."**

The facts set forth in these excerpts from the opinion of the Court of Appeals are undisputed:

> "The plaintiff * * * was * * * one of 88 dealers in the Charlotte area who were familiar with the plan (of distribution, interpolated) and operated under it. * * *"
>
> "* * * plaintiff in his testimony admitted that the knowledge that he would not represent the company after the expiration of his pending dealership contract influenced him in sending the order.
>
> "The size of the order was not only unprecedented but it was so great that the plaintiff could have had no reasonable expectation that the company would be able to fill it without depriving other dealers in the Charlotte branch of their fair share of deliveries, or in other words, without completely changing the company's method of doing business."
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> * * *
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> "In view of these facts, it is obvious that there is no reasonable ground for the contention that the plaintiff believed that his order was in accordance with the priority system which limited all of the company's deliveries, or that the company would be able to fill it.
>
> * * *
>
> "* * * This refusal to honor the order was entirely justified, for it called for goods far in excess of

> the plaintiff's fair share * * * and far more than the plaintiff had any reason to expect the company to deliver."
>
> * * *
>
> "* * * the order which he applied for was one obviously beyond the power of the company to fulfill * * * there was the corresponding obligation upon the dealer to exercise good faith within the confines of the contract. The order of June 20, 1945, *was so far outside the dealer's agreement* that in legal significance it constituted merely an offer to enter into a new contract that the company had a perfect right to reject." (Emphasis added.)

The conclusions based upon the foregoing facts are crystal clear. No other reasonable inference could be drawn: the order was submitted with full knowledge that under the stringencies attendant upon the war, it could not be filled. It was so far outside the contract, as emphasized in the preceding quotation, that the company had a perfect right to reject it.

On undisputed facts as to the circumstances existing at the time of the order and the method of doing business then subsisting between the parties, the dealer agreement and order both being in writing, it was not only the right but the duty of the trial Court, and, this position being maintained, of the appellate Court, to determine whether the order was within the contemplation of the agreement, before any evidence thereabout was left to the jury. In reaching its ultimate conclusion that "the order of June 20, 1945, furnishes no basis for recovery in this case" the Court of Appeals clearly and correctly discharged such duty, for having determined as a matter of law that the order furnished no basis for recovery, there was left no evidence upon which the jury could properly proceed to find a ver-

dict. *Gunning v. Cooley,* 281 U. S. 90, 94, 50 S. Ct., 231, 74 L. Ed. 720.

The fallacy of petitioner's contention that there was a conflict in the evidence lies in the fact that any such conflicts are collateral to, and do not affect, the very crux of the case.

Almost a corollary to what has been said in the foregoing discussion is our position in reference to petitioner's second assertion of error, that the Court of Appeals should not have reversed the judgment below on the basis of the Trial Judge's charge. (Petition, pp. 8 and 9.) While it is true that specific exception was not made to such portion of the charge, in fairness to respondent it should be pointed out that its position had been fully covered in argument for the direction of the verdict in its favor, and when asked if there were exceptions, our reply was that our views had been stated, and need not again be detailed. (Reporter's Tr., R. p. 108.) Not even on appeal did respondent assert error in the charge, because if correct in its position that there should have been a directed verdict in its favor, it mattered not what was charged the jury—**error in the charge to the jury was rendered academic.** Assuming the correctness of our position with respect to a directed verdict, any charge at variance with such position would have been erroneous.

It should here be pointed out that any application of *Acme Mfg. Co. v. Arminius Chemical Co.,* 264 Fed. 27, 275 Fed. 1021, (cert. den. 257 U. S. 647, 66 L. Ed. 415, 42 S. Ct.), cited in petitioner's brief at p. 23, is likewise precluded by the same reasoning: it does not inveigh against the soundness of our position, that the order as a matter of law was outside the dealer agreement. Had the Court of Appeals decided in favor of respondent upon the point, also